JERRY D. GROVER D.B.A. KINGSTON RUST DEVELOPMENT
(GROVER VI)

IBLA 2002-367 Decided March 10, 2004

Appeal from a decision of the Utah State Office, Bureau of Land Management, declaring 39 unpatented oil shale mining claims null and void by operation of law for failure to pay maintenance fees. UMC 115435, et al.

Reversed and remanded.

1. Energy Policy Act of 1992: Generally--Energy Policy Act of 1992: Oil Shale: Mining Claims: Rental or Claim Maintenance Fees--Oil Shale: Mining Claims

   Prior to July 1993, 43 CFR 3833.5(d) (1992) required personal notice to claim holders of record and "owners whose names show on annual filings" of contest proceedings or actions initiated by the United States. The regulation was amended in July 1993, and now requires BLM to look only to its official recordation files to ascertain owners when serving process in contest or other proceedings. The regulation does not constitute or establish an independent basis for attacking the sufficiency of notice required by and provided pursuant to the Energy Policy Act, 30 U.S.C. § 242 (2000).

2. Energy Policy Act of 1992: Generally--Energy Policy Act of 1992: Oil Shale: Mining Claims: Rental or Claim Maintenance Fees--Oil Shale: Mining Claims

   Actual notice of the requirements of the Energy Policy Act was provided by BLM and by this Board in prior decisions construing the Act in appeals filed by appellant or his

predecessor in interest. Nothing in the Act mandates renewed personal notice for each claim held by an individual claim holder after he has received actual and constructive notice of the Act's requirements.

3. Energy Policy Act of 1992: Generally--Energy Policy Act of 1992: Oil Shale: Mining Claims: Rental or Claim Maintenance Fees--Oil Shale: Mining Claims

Where oil shale applications for limited patent were filed and accepted for processing on May 13, 1993, after October 24, 1992, the effective date of the Energy Policy Act, the claims are subject to the election provisions of the Act, 30 U.S.C. § 242(d) (2000), and must be maintained until such time as patent may be issued by, among other things, paying $550 per claim per year. 30 U.S.C. § 242(e) (2000). Where BLM's decisions treated appellant's oil shale claims as if the patent applications had been pending before the Department on or before October 24, 1992, which instead would have required appellant to maintain the claims in accordance with the requirements of applicable law prior to enactment of the EPA by paying a $100 claim maintenance fee, the decisions are properly reversed.

APPEARANCES: Jerry D. Grover, Jr., Provo, Utah, pro se.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Jerry D. Grover, Jr., d.b.a. Kingston Rust Development, has appealed two April 29, 2002, decisions of the Utah State Office, Bureau of Land Management (BLM), declaring 39 oil shale claims [1/] null and void by operation of law as of

[1/] The claims at issue are the Argyle Nos. 2-4 (UMC 115435-115437); the Harmon Group Harmon No. 1 (UMC 115464); the Harmon Nos. 2-8 (UMC 115465-115471); the Pershing Nos. 1-4 (UMC 115623-115626); the Western Dome Nos. 1-4 (UMC 115627-115630); the Apex Nos. 1-4 (UMC 115631-115634); the Geyser No. 1 (UMC 115641); the Oil Dome No. 1 (UMC 115642); the Willow Creek Placer Nos. 2-5 (UMC 115784-115787); the Willow Creek Placer No. 8 (UMC 115790); the Willow Creek Placer Nos. 12-14 (UMC 115794-115796); and the Willow Creek Placer Nos.
(continued...)

September 1, 2000, for failure to pay a claim maintenance fee of $100 per claim for the 2001 maintenance year. [2/] Two applications for limited patent covering all 39 claims had been filed on May 13, 1993. Those applications were still pending when BLM issued its decisions.

Previously, by decisions dated September 14, 1993, BLM had declared all 39 claims abandoned by reason of the failure to file the notice of election required by Section 2511 of the Energy Policy Act of 1992 (EPA), 30 U.S.C. § 242 (2000). The September 14 decision was issued to Alexander H. Walker, Jr., and Cecil Ann Walker (the Walkers), and pertained to the Argyle, Harmon, and Willow Creek claims. The companion September 14 decision was issued to Exxon Coal and Minerals Company (Exxon CMC), and it related to the Pershing, Western Dome, Apex, Geyser, and Oil Dome claims.

BLM rescinded the September 14, 1993, decisions on April 19, 2000, and issued two new, virtually identical decisions, styled New Procedures for Unpatented Oil Shale Mining Claims, on the same date. [3/] One April 19 decision was issued to

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[1/] (...continued)
16-21 (UMC 115798-115803). The claims were located in 1918 and 1919.

[2/] The maintenance year begins on Sept. 1 of each year. Grover had timely paid claim maintenance fees of $100 per claim for the 2002 maintenance year, which began Sept. 1, 2001, for the Harmon No. 7, Harmon No. 8, Apex Nos. 1-4, and the Oil Dome No. 1.

[3/] Between 1993 and 2001, Grover prosecuted two lawsuits in Federal court. In Jerry D. Grover, Jr., d.b.a. Kingston Rust Development v. United States of America, No. 98-26 L, Slip Op. (Fed. Cl. Sept. 16, 2002), the instant oil shale claims and others were before the Court of Federal Claims on a Fifth Amendment complaint charging lack of due process and a taking without just compensation. By order filed on Sept. 16, 2002, the Court of Federal Claims ruled for the Government on cross-motions for summary judgment. That decision was affirmed in an unpublished order. Jerry D. Grover, Jr. v. United States, No. 03-5021 (Fed. Cir. Aug. 7, 2003).

Grover and PIC also had a complaint pending before the U.S. District Court for the District of Utah, Jerry D. Grover d.b.a. Kingston Rust Development and Production Industries Corp. v. Babbitt, et al., Case No. 2:99cv0697 ST (D. Utah). The complaint in that case was dismissed by order dated June 26, 2001, on the ground that BLM's withdrawal of the decisions of Sept. 14, 1993, had mooted the controversy. The Board has only a copy of that order, which did not identify the specific claims at issue before the court, but, based on Grover's allusion to a U.S.
(continued...)

the Walkers, Grover, and Production Industries Corporation (PIC); the other April 19 decision was issued to Exxon CMC, Grover, and PIC. [4/] Both decisions provided a copy of Section 2511 of the EPA and a newspaper notice detailing the Act's requirements, and stated that "the legislation requires that if you have not applied for a patent application by October 24, 1992, you must file an election in this office to either apply for a limited patent or maintain the claims according to the new provisions within 180 days from receipt of this notice." [5/] (April 19, 2000, Decisions at 1.)

On August 28, 2000, Grover filed a notice of election to seek limited patent. (Decision at 2.)

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[3/] (...continued)
District Court case and the timing of the Apr. 19, 2000, recission decisions, it appears the claims presently before us also were before the District Court. See Notice of Appeal and Statement of Reasons (NA/SOR) at 2.

[4/] We note that serious questions about PIC's chain of title were raised by the court in Jerry D. Grover, Jr., d.b.a. Kingston Rust Development v. United States of America, No. 98-26 L, Slip Op. at 3-4 (Fed. Cl. Sept. 16, 2002). With his NA/SOR, Grover submitted a copy of an Aug. 3, 1992, Warranty Deed by which PIC purported to convey a 60-percent interest in the Harmon Group Harmon No. 1, the Harmon, Argyle, and Willow Creek claims to Grover. He also submitted another Warranty Deed, also dated Aug. 3, 1992, by which PIC purported to convey a 5-per cent interest in the Pershing, Geyser, Apex, Western Dome and Oil Dome claims. Lastly, Grover has provided a copy of a Special Quitclaim Deed dated Dec. 14, 1994, by which PIC purported to convey all its title and interest in numerous claims in Utah and Wyoming, identified in an Exhibit A by section numbers and Township and Range, but without claim names or BLM serial numbers. Exhibit A apparently was attached to that deed.

Whatever questions there are or may be about PIC's, and hence Grover's, title to the claims, the authority of the Department of the Interior is limited to establishing the rights of a mining claimant as against the United States. E.J. Belding, Jr., 109 IBLA 198, 205-06, 96 I.D. 272, 276 (1989); see also Gold Road Red Top Mining Co., 145 IBLA 335, 337-38 (1998), and cases cited.

[5/] We have previously construed the notice requirements of the EPA. See Jerry D. Grover d.b.a. Kingston Rust Development (Grover II), 141 IBLA 323, 323-24 (1997); Jerry D. Grover d.b.a. Kingston Rust Development (Grover I), 139 IBLA 178, 180 (1997); and Production Industries Corp., 138 IBLA 183, 187 (1997).

The April 29, 2002, decisions at issue in this appeal state:

> Section 2511(c)(2) of the [EPA] requires the holder of an oil shale claim who has elected to proceed to patent and filed a patent application, but not received FHFC [First Half Final Certificate] for the claims therein, to maintain the oil shale claims prior to patent issuance in accordance with the requirements of applicable law prior to October 24, 1992 (30 U.S.C. 242(c)(2)); see Jerry D. Grover d/b/a/ Kingston Rust Development [Grover I], 139 IBLA 178 (1997). See, e.g., 43 CFR 3833.1. Under 30 U.S.C. 28f, the Interior and Related Agencies Appropriation Act for Fiscal Year 1999 and the regulations at 43 CFR 3833.1-5, require holders of mining claims or [mill and tunnel] sites to pay to BLM on or before September 1 of each year a maintenance fee of $100 per claim for the upcoming maintenance year. * * * Failure to pay the maintenance fee without obtaining a waiver of the fee shall conclusively constitute a forfeiture of the unpatented mining claim by the claimant and the claim or site shall be deemed null and void by operation of law.

(Decision at 2.) Accordingly, because the $100 maintenance fee had not been paid for each claim on or before September 1, 2000, BLM declared all 39 claims null and void by operation of law as of September 1, 2000. Grover timely appealed.

## Arguments

On appeal, Grover makes several basic arguments. First, he asserts he was denied due process because neither he nor his predecessor received notice of the EPA's provisions. (NA/SOR at 1, 2.) Additionally, he argues that "[i]n 1992, independent of the EPA notice requirement, 43 CFR 3833.5(d) (1992), required the BLM to personally notify and serve any mining claim owner whose name shows on annual filings of any action initiated by the United States affecting an unpatented mining claim," and states that neither he nor his predecessor received such notice pursuant to 43 CFR 3833.5(d) (1992). (NA/SOR at 1.)

Grover argues that, had BLM given him proper notice under the EPA, he would have had 180 days to make an election under the Act. He contends that the "law which existed during the time frame during which [he] should have received proper notice was entirely different than the law that existed on April 19, 2000, when BLM finally sent some sort of notice to Appellant." (NA/SOR at 2.) As examples of the changes to support that argument, Grover cites 43 CFR 3833.1-5 and 3833.0-3(f) (1993). He therefore claims he was denied due process, reasoning that, had he

received proper notice under the EPA, he "would have had 20 months (January 1993 to August 1994) prior to being potentially subject to any threat of abandonment under the CFR." (NA/SOR at 2.) He thus reasons that he should have had "at least until December 2002 to file any fees necessary to avoid abandonment" of the claims, since he did not receive the "new" notice of the EPA's election requirements until April 21, 2000. (NA/SOR at 2.)

Grover next notes that BLM's view that the claims are subject to the $100 claim maintenance fee is inconsistent with the positions advanced in the appeals docketed as IBLA 99-8, 99-9, 99-11, 99-12, and 99-58. (NA/SOR at 3.) He therefore characterizes BLM's stances regarding all of his oil shale claims as arbitrary and capricious, and beyond the "rule of law, equity, or due process." (NA/SOR at 3.)

Fourth, Grover contends that fees in lieu of assessment work are not required while litigation involving invalidated claims was pending in Federal court. As support, he makes a somewhat different point in asserting that BLM failed to notify him of the decision of September 14, 1993, which deprived him of the opportunity to appeal to this Board, forced him to go to Federal court, and "caused an illegal invalidation of the subject claims for approximately 7 years." (NA/SOR at 3-4.) Grover relies on Board precedent in noting that no assessment work or fees are required while an "invalidated claim is under review in Federal Court." (NA/SOR at 4.)

Grover's final argument is that existing law prior to October 24, 1992, the effective date of the EPA, did not include the "Interior and Related Agencies Appropriation Act for Fiscal Year 1999." (NA/SOR at 4.)

Analysis

[1] Grover's first arguments relate to notice pertaining to requirements established by the EPA and by 43 CFR 3833.5(d) (1992). In Grover II, 141 IBLA 323, this Board looked to 43 CFR 3833.5(d) (1992) for guidance in determining who should receive the critical notice of the EPA's requirements which would trigger the obligation to elect a claim status within 180 days to avoid conclusive abandonment of the claims. It appears that Grover believes that, under the regulation and as a result of the decision in Grover II, he was entitled to personal notice of the EPA's requirements independent of that established by the Act, and that the failure to receive a separate notice pursuant to 43 CFR 3833.5(d) (1992) vitiates a notice provided pursuant to the EPA. To the extent we correctly understand his position, he is in error. We said the following in Jerry D. Grover d.b.a. Kingston Rust Development (Grover III), 160 IBLA 234 (2004):

> BLM challenges the decision in Grover II, 141 IBLA at 323-24, insofar as we turned to the provisions of 43 CFR 3833.5(d) (1992) for guidance in determining who should receive the critical notice of the EPA's requirements that would then trigger the obligation to elect a claim status within 180 days to avoid forfeiture of the claims. (See Answer in IBLA 99-11 at 13-14.) In Grover II, Grover had submitted the deed by which he acquired an 80-percent interest in the Wyoming claims there at issue, and BLM had received a copy of that deed mere days after sending notice to PIC, and scant days before the statutory deadline for sending notice to all claim holders was to expire. Given BLM's actual knowledge of Grover's status as a claim holder, the presumed abandonment specified by the EPA for failing to act after notice, and the lack of regulations in this virginal phase of implementing a new statute, we concluded that "BLM was bound to notify every claim holder of an oil shale claim of whose existence it became aware before the December 23, 1992, deadline." [Grover II,] 141 IBLA at 324.

Grover III, 160 IBLA at 246 n. 12 (emphasis added).

As the emphasized language shows, it was because of the unique circumstances of the case and the state of the law at that point that we deemed it appropriate to require, by analogy, personal notification of any oil shale claim holders actually known to BLM equal to that required in contest proceedings or other actions against mining claims. Manifestly, we did not determine that 43 CFR 3833.5(d) (1992) established an independent basis for attacking the sufficiency of notice required and provided pursuant to the EPA. Moreover, the regulation was amended in 1993 and the amended rule was in effect when the September 14, 1993, decisions were issued to the claim holders of record. The current regulation now requires BLM to look only to its official recordation files to ascertain claim owners when serving process in contest proceedings. 58 FR 38186, 38201 (July 15, 1993). Thus, only claim owners who have recorded their claim pursuant to 43 CFR 3833.1-2 and have filed a notice of transfer pursuant to 43 CFR 3833.3 are entitled to personal notice of contest proceedings and other actions against their claims. Conversely, there is no longer any duty to consider "owners whose names show on annual filings" as "parties whose rights are affected by such action or contest," or to personally serve them. As we said in Grover III, 160 IBLA at 246 n. 12, "[o]ur phrasing ('We reject BLM's argument that 43 C.F.R. § 3833.5 (1992) should not apply here because BLM sent a notice to PIC * * *') was hardly tantamount to a ruling that a mining claimant need not comply with the regulations governing notice of transfer, and we expressly disavow any such conclusion or inference."

[2] In any event, the record in this appeal shows that PIC and/or Grover received actual notice of the EPA's requirements from BLM at least as early as December 11, 1992, Production Industries Corp., 138 IBLA at 184, and he has successfully argued important aspects of that Act before this Board in Grover I and II, confirming that he received such notice. Grover III, 160 IBLA at 246. Any conceivable question regarding the sufficiency of notice was cured when Grover received actual notice of the EPA's requirements from this Board as a consequence of our decisions in Grover I and II. Contrary to Grover's interpretation, nothing in that Act requires renewed personal notice for each claim held by an individual claim holder after he has received actual and constructive notice of applicable requirements.

For much the same reason, we find no merit to the further contention that Grover was prejudiced by receiving another notice of the EPA's requirements in April 2000. See NA/SOR at 2, 3. To some extent this allegation is premised on perceived prejudice to appellant resulting from changes in the law between 1992 and 2000, an argument we will deal with infra in discussing the status of Grover's claims under the EPA.

As to the significance Grover attributes to the fact that BLM has articulated different positions in other decisions appealed to the Board, we observe in passing that there is nothing inherently wrong or dubious in advocating alternative positions, particularly when the subject is a new statute and the questions presented are of first impression. What is more important, however, is that this Board has adjudicated the merits of the parties' contentions in all of those other appeals. Jerry D. Grover d.b.a. Kingston Rust Development (Grover V), 160 IBLA 318 (2004); Jerry D. Grover d.b.a. Kingston Rust Development (Grover IV), 160 IBLA 261 (2004); Grover III, 160 IBLA 234. [6/] We sustained BLM's decisions as issued or as modified based on the law, analysis, and reasoning expressed therein. Consequently, we find no merit in this argument.

We now turn to the remaining arguments relative to substantive requirements of the EPA applicable to these oil shale claims. We begin by noting that, according to BLM's decision, patent applications for these claims were filed and accepted for processing on May 13, 1993, by PIC, Grover's predecessor in interest. Therefore, they were subject to the provisions of Section 2511(d) and (e), which provide:

[6/] Dispositive orders were issued in IBLA 99-58 and IBLA 99-68 on Dec. 22, 2003.

**(d) Election**

(1) Notwithstanding any other provision of law, within 180 days from the date of which the Secretary provided notice under subsection (a) of this section, a holder of a valid oil shale mining claim for which a patent application was not filed and accepted for processing by the Department of the Interior *prior to October 24, 1992*, shall file with the Secretary a notice of election to–

> (A) proceed to limited patent as provided in subsection (e)(1) of this section; or
>
> (B) maintain the unpatented claim as provided for in subsection (e)(2) of this section.

(2) Failure to file the notice of election as required by paragraph (1) shall be deemed conclusively to constitute an abandonment of the claim by operation of law.

(3) Any claim holder who elects to proceed under paragraph (1)(A) must apply for a patent within 2 years from the date of election or notify the Secretary in writing prior to expiration of the 2-year period of a decision to maintain such claim as provided in paragraph (1)(B) or such claim shall be deemed conclusively to have been abandoned by operation of law.

(4) The provisions of this subsection shall be in addition to the requirements of section 1744 of Title 43 [mandatory filings required by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (2000)].

**(e) Effect of election**

(1) * * * * *

(2) Notwithstanding any other provision of law, a claim holder referred to in subsection (c) of this section or a claim holder subject to the election requirements of subsection (d) of this section who maintains or elects to maintain an unpatented claim shall maintain such claim by complying with the general mining laws of the United States, and with the provisions of this section, except that the claim

> holder shall no longer be required to perform annual labor, and instead shall pay to the Secretary $550 per claim per year for deposit as miscellaneous receipts in the general fund of the Treasury commencing with calendar year 1993.

30 U.S.C. § 242(d) and (e) (2000) (emphasis added).

[3] Grover's patent applications were filed and accepted for processing after October 24, 1992. BLM's decisions therefore erred in treating the claims as if limited patent applications were pending before the Department on or before October 24, 1992, which in turn would have required Grover to maintain the claims "in accordance with the requirements of applicable law prior to enactment of [the EPA]."[7/] See Grover III, 160 IBLA at 250-51; Grover I, 139 IBLA at 184. Because the patent applications were filed and accepted for processing after October 24, 1992, however, the claims must be maintained by paying $550 per claim per year until such time as patent may be issued. 30 U.S.C. § 242(e) (2000). That conclusion is governed by our reasoning in Grover III, 160 IBLA at 251-52, where we observed that subsection (d) of the EPA is

> a procedural mechanism for formally ascertaining and resolving the status of oil shale claims, but it does not abolish the basic necessity of maintaining possession of one's claims as against the United States by complying with applicable law until such time as patent may be issued or the claim is otherwise invalidated. Indeed, the Senate Committee on Energy and Natural Resources plainly stated as much: "The Committee notes that claim holders electing to apply for a limited patent under this section must continue to maintain their claims prior to patent issuance in accordance with applicable law prior to enactment of the legislation." S. Rep. No. 101-259 (1990) and S. Rep. No. 101-260 (1990) at 6 (emphasis added). Subsection (d) confers the right and opportunity to file an application for limited patent. It does not confer the unique

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[7/] Because the limited patent applications at issue here were filed after Oct. 24, 1992, there is no need to consider whether "applicable law prior to enactment of [the EPA]," 30 U.S.C. § 242(c)(2) (2000), included the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-27, 112 Stat. 2681-235 (1999 Act), which re-authorized claim maintenance fees for the years 1999 through 2001 for all other mining claims, mill sites, and tunnel sites, and for oil shale claims for which no fees are imposed under the EPA. Grover mistakenly refers to the 1999 Act as the "Interior and Related Agencies Appropriation Act for Fiscal Year 1999." See NA/SOR at 2.

> exemption from applicable law that Grover seeks. The claim holder therefore must continue to maintain his claims during the 2-year period afforded by the statute. Our conclusion is confirmed by subsection (e)(2) of the Act, which by its terms is applicable to "a claim holder referred to in subsection (c) of this section or a claim holder subject to the election requirements of subsection (d) of this section who maintains or elects to maintain an unpatented claim," and expressly requires the payment by these claim holders of "$550 per claim per year."

Grover III, 160 IBLA at 251.

We further held:

> [3] The persons subject to the election provisions of subsection (d) are those who maintain or elect to maintain unpatented claims who are not described in or subject to subsection (b) or (c)(1)and (2). Again, however, all persons hold unpatented mining claims by timely fulfilling the conditions prescribed to maintain the claims, and this they must do, regardless of whether, in the case of an oil shale claim, they intend to file a patent application in the future or may at some later point choose not to pursue such a course of action. We therefore conclude that the phrase "maintains or elects to maintain unpatented claims," while structured to track the elective aspects of the EPA in describing claim holders not covered by subsections (b) and (c)(1) and (2), neither negates the fundamental necessity of maintaining one's possessory right by complying with the law, nor creates an exception to that rule.
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> [4] Congress has, of course, altered the manner of maintaining oil shale claims in important ways. Thus, while [sic] subsection (e) of the EPA, 30 U.S.C. § 242(e)(2) (2000), affirms that subsection (c)(3) and (d) claim holders "shall maintain such claim by complying with the general mining laws of the United States, and with the provisions of this section." It also states that, notwithstanding any other provision of law, "the claim holder shall no longer be required to perform annual labor, and instead shall pay to the Secretary $550 per claim per year." (Emphasis added.) Accordingly, we hold that subsection (e)(2) requires that oil shale claims for which an election to proceed to limited patent has been filed must be maintained in accordance with the mining law, FLPMA, and with the EPA, until such time as patent may be

issued, including during the 2-year period before the deadline for filing the application expires.

160 IBLA at 252.

In Grover III, the two-year period for filing a patent application following the filing of a notice of election had not expired, and no application had been filed. In contrast, we must here determine whether a different result is compelled either because of the sequence of events in this case or because patent applications have actually been filed. We find neither circumstance compels a different outcome. For the reasons noted infra, the sequence of events in no way deprived Grover of any right or opportunity conferred by the EPA. As to the fact that patent applications have been filed, we can imagine no rational basis for requiring a claimant to maintain a claim by paying $550 per year per claim during the two-year period allowed for filing a patent application, Grover III, 160 IBLA at 252, while relieving him of that obligation after the application has been filed. It follows that the decisions must be reversed and the case remanded to BLM so that it can issue new decisions in conformity with the correct patent application date and the reasoning articulated here and in Grover III.

Notwithstanding that conclusion, Grover's remaining arguments require a response. Grover contends that BLM's failure to notify him of the September 13, 1993, decisions deprived him of the opportunity to appeal to this Board and forced him to seek redress in Federal court. Putting aside the Federal Claims Court's questions regarding PIC's title to these claims, [8/] Grover notably does not argue that he or PIC filed the notice of transfer required by 43 CFR 3833.3, nor does he allege that the decisions were improperly issued to the Walkers and Exxon CMC, because they were not the claim holders of record. More than once we have warned Grover that he failed or refused to comply with the notice of transfer regulation at his own peril, see Grover III, 160 IBLA at 238 n. 3 and Grover I, 139 IBLA at 181, and as noted above, the regulation from which we drew an analogy, 43 CFR 3833.5(d) (1992), now requires notice of any action or contest initiated by the United States only to claim owners of record, and has so provided since July 1993. Accordingly, absent evidence that Grover or PIC were claim holders of record as of September 14, 1993, this argument is without merit. [9/]

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[6/] See n. 4 supra.

[9/] Nor do we agree that initiating litigation in Federal court per se constitutes injury or prejudice to Grover. First, this Board has no jurisdiction to hear Constitutional

(continued...)

We are likewise unpersuaded by the arguments relating to Grover's contention that he has been prejudiced by receiving notice of the EPA's election provisions in April 2000, after he acquired PIC's title to the oil shale claims. As we have stated repeatedly, Grover and his predecessor were provided notice of the EPA's requirements in December 1992, if not earlier. No prejudice is demonstrated in this case by the fact that the right of election was triggered in 2000 rather than in 1993, because Grover was afforded the full 180 days to make his election, precisely as specified by the EPA, 30 U.S.C. § 242(a) (2000), he timely exercised that right, and an application for limited patent was filed in 1993.

Grover suggests that, depending on when notice of the EPA's requirements was provided, it might have been possible to somehow gain additional time for paying the fee imposed by subsection (e) of the EPA, 30 U.S.C. § 242(e) (2000). However, the EPA states that, for applications for limited patent filed after the EPA's effective date, oil shale claimants shall pay $550 per claim per year, and that such payment shall accompany filings pursuant to Section 314(a)(2) of FLPMA, 43 U.S.C. § 1744(a)(2) (2000). Implementing regulations have established the deadline for payment of the oil shale claim maintenance fee as December 31 of each calendar year. 43 CFR 3833.1-5(e). BLM was bound to act in accordance with the statute, and thus we expressly decline to entertain this line of speculative argument.

Lastly, the question of whether and to what extent fees for oil shale claims that are subject to subsections (d) and (e) of the EPA, 30 U.S.C. § 242 (d) and (e) (2000), can be imposed during the pendency of an appeal has been decided. When a BLM decision declaring an oil shale claim a nullity is appealed and the decision is not stayed, the decision is effective as of the close of the appeal period, and the claims cease to exist. Consistent with that claim status, there is no requirement to perform assessment work or pay claim fees during the pendency of the appeal to this Board or a Federal court of that decision. Grover III, 160 IBLA at 256, and cases cited. However, it is not correct that a claim holder is forever relieved of the obligation to maintain his claims by paying $550 per claim per year merely because he invokes the right to review of a BLM decision. "The maintenance fee obligation in the EPA is to pay $550 per claim per year.' Nothing in that plain language of the EPA provides a legitimate basis for concluding that Congress intended to relieve a claim holder of the

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[9/] (...continued)
claims in any circumstance; Grover had no choice but to go to Federal court to pursue his Fifth Amendment claims. Second, Grover received all the relief he could have received had he gone to trial in the district court and prevailed on the merits: BLM withdrew its Sept. 14, 1993, decisions declaring these oil shale claims abandoned and void, and the claims were fully reinstated as if the decisions had never issued.

fee requirement for a reason not enumerated in the Act itself." Grover III, 160 IBLA at 256. Therefore, when a BLM decision voiding an oil shale claim is reversed in its entirety, the oil shale claim is reinstated as if the decision had never been issued, and so are all attendant rights and obligations, including the obligation to pay $550 per claim per year. Grover III, 160 IBLA at 257. Because the EPA made no provision for an automatic forfeiture by operation of law for failure to pay the yearly fees, we held that, upon reversal of the voidance decision, BLM is required to provide notice of the fees due for each claim for each year the appeal was pending and a reasonable period in which to pay the fees thus accrued. Grover III, 160 IBLA at 257-59. The result is the same when BLM determines to withdraw a voidance decision that is before a Federal court. Accordingly, on remand, BLM must notify Grover of the oil shale claim maintenance fees that have become due pursuant to subsection (e)(2) of the EPA, 30 U.S.C. § 242(e)(2) (2000), and afford him a reasonable opportunity to pay them before BLM can take further action.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded for issuance of new decisions in conformance with the facts and opinion expressed herein.

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T. Britt Price
Administrative Judge

I concur:

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James F. Roberts
Administrative Judge